



United States
Department of
Agriculture

Farmers
Home
Administration

Washington
D.C.
20250

FmHA AN No. 1940 (1955)

June 19, 1989

SUBJECT: Recording Easements on Inventory Farms
Prior to Sale

TO: All State Directors, State Environmental
Coordinators, Farmer Program Chiefs, District
Directors, and County Supervisors

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to provide field offices with a conservation easement format that can be used to record floodplain and wetland conservation easements after applicable redemption rights and the rights of prior owner(s) and operator(s) have expired and prior to the sale of the property affected by the easement. The intended outcome is to reduce the backlog of presently unrecorded easements.

COMPARISON WITH PREVIOUS ANs:

This AN provides an additional conservation easement format from that contained in FmHA AN No. 1923 (1955), dated May 12, 1989, and entitled "Protecting and Enhancing Wetlands and Floodplains on Farmers Home Administration Inventory Property."

IMPLEMENTATION RESPONSIBILITIES:

Over the course of the last several months, the Farmers Home Administration (FmHA) has agreed to numerous conservation easements for the protection of floodplains and wetlands, as recommended by the U.S. Fish and Wildlife Service (FWS). Until now, these easements could be recorded only with the deed for the property at the time of sale. Consequently, we presently have a large backlog of unrecorded easements.

As you are aware, our initial method for establishing a floodplain or wetland conservation easement is contained in Attachment 1 to FmHA AN No. 1923 (1955), dated May 12, 1989, and entitled "Protecting and Enhancing Wetlands and Floodplains on Farmers Home Administration Inventory Property." This method (hereafter referred to as the reservation format) reserves the easement rights in the Federal government at the time the remaining rights in the property are transferred to the new property owner.

EXPIRATION DATE: June 30, 1990

FILING INSTRUCTIONS: Preceding
FmHA Instruction 1955-C



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Secretary of Agriculture, Washington, D.C. 20250

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It is preferable to all parties concerned that these conservation easements, once agreed to by FmHA, be recorded as soon as possible. By timely recording, we can avoid (1) the need for an interim caretaker agreement; (2) uncertainty among future buyers; and (3) possible mistakes or failures to record the easements at the time of sale.

Attachment 1 to this AN is entitled "Conservation Easement Deed." It is specifically designed for floodplain and wetland easements and can be recorded independently and prior to the sale of the farm property. This is possible because the "Conservation Easement Deed" transfers the easement rights out of FmHA's ownership to a third party who is the owner of the easement. The document is based on the transfer authority contained in Section 616 of the Agricultural Credit Act of 1987 (P.L. 100-233) and Section 1955.139(c) of FmHA Instruction 1955-C.

By this AN, State Directors are delegated the authority to use the "Conservation Easement Deed." Because it is based on the above referenced transfer authority, the limitation on that authority must always be met. That is, Attachment 1 to this AN can be used only in those cases where the rights of the prior owner(s) and prior operator(s) have expired. When they have not expired and these rights are exercised and a required easement must be placed on the property, the reservation format contained in Attachment 1 to AN No. 1923 (1955) will be used to establish the easement at time of sale.

There are three important aspects of the "Conservation Easement Deed" that differ from our use of the reservation format. First, the "Conservation Easement Deed" does not require the designation of an easement manager. The owner of the "Conservation Easement Deed" is the easement manager. For floodplain and wetland cases, eligible owners are: (1) the Forest Service, when easement land is an inholding in a National Forest; (2) FWS; and (3) the State agency having counterpart responsibilities to FWS. The second different aspect is the improved language for ensuring future access to the easement area (See paragraph I. of Attachment 1). This improved language can also be used in the reservation format to replace the access language contained in paragraph III. A. of that format (see Attachment 1 of AN No. 1923 (1955)). Third, at the eventual time of sale for a property previously encumbered with a "Conservation Easement Deed," you should ensure that the deed for the property clearly references the previous recording provisions, including the date of the "Conservation Easement Deed" and the book and page number where recorded in the local recording office. Obtain the assistance of your Regional Office, Office of the General Counsel in doing this.

Finally, because the "Conservation Easement Deed" is a new tool for us and may raise some legal questions, attached as Attachment 2 to this AN is a legal opinion on its acceptability. This opinion has been provided to the Department's Regional Attorneys.

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Based upon the contents of this AN, you should immediately begin to reduce any backlog of unrecorded easements. Attachment 1 should be used for all properties that (1) you have agreed to a floodplain/wetland easement, (2) applicable redemption rights and prior owners'/operators' rights have expired, and (3) you do not expect to sell or transfer within approximately 120-days from completion of items (1) and (2). Also, if you have a backlog of unanswered FWS's recommendations for easements, you need to respond promptly to these recommendations.

Thank you for your cooperation.



NEAL SOX JOHNSON
Acting Administrator

Attachments

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Attachment 1

Conservation Easement Deed

THIS CONSERVATION EASEMENT dated this _____ day of _____, 19____, by and between the UNITED STATES OF AMERICA acting by and through the Secretary of Agriculture represented by the Farmers Home Administration, herein referred to as the "Grantor" or "Landowner," and the UNITED STATES OF AMERICA acting by and through the Secretary of the Interior on behalf of the United States Fish and Wildlife Service, herein referred to as the "Grantee".

(alternative for State agency)

[THIS CONSERVATION EASEMENT dated this _____ day of _____, 19____, by and between the UNITED STATES OF AMERICA acting by and through the Secretary of Agriculture represented by the Farmers Home Administration, herein referred to as the "Grantor" or "Landowner", and the STATE OF _____ acting by and through the _____ (Name of State Department or Agency) _____, herein referred to as the "Grantee".]

This easement is under the authority and in furtherance of the provisions of Federal law, including sections 331, 335, and 354 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1981, 1985, and 2002), Executive Order 11990 providing for the protection of wetlands, and Executive Order 11988 providing for the management of floodplains. The restrictions and covenants contained in this easement constitute a perpetual servitude on and run with the property. The Grantor and all successors and assigns ("landowner") under this deed covenant with the Grantee to do or refrain from doing, severally and collectively, the various acts mentioned later in this easement. The Grantee is conveyed the rights enumerated in this easement for itself and its successors, agents and assigns.

NOW THEREFORE, for and in consideration of the Congressionally mandated purposes as authorized by the above referenced authorities and other conservation benefits conferred by the transfer of these lands pursuant to federal law, the Grantor does grant, convey and transfer a conservation easement with appurtenant rights of access to the Grantee on and over the following described lands.

I. Description of the Easement Area and Access Thereto:

The area subject to this Conservation Easement, referred to herein as the "easement area" is described as follows:

[legal description, or reference to appended plat]

And this easement area being a part of that tract of land conveyed from _____ to _____ by deed dated _____ 19____, which deed is recorded at Book _____, page _____ in the land records of _____ County, State of _____, said tract being referenced herein as the "servient estate."

Without limiting the general and specific rights of access in paragraph III-A, for access to the easement area, a right of way for an [existing] [road, trail, etc] over the above referenced servient estate as follows:

[legal description -- center line survey or reference to other location of the road or path, or reference to appended plat or drawing]

[The above right of way shall be sufficiently wide (not to exceed ____ feet) to accommodate access by vehicles and equipment deemed necessary or desirable by the Grantee for easement management.] [Any costs associated with road construction and maintenance shall be shared by the landowner and the Grantee commensurate with their respective levels of use.] In the event that the location of a road or trail becomes impractical due to erosion, Acts of God, or other cause, said location can be reasonably adjusted to accommodate access in accordance with the rights of paragraph III-A herein.

II. Covenants by the Landowner.

A. No dwellings, barns, outbuildings or other structures shall be built within the easement area.

B. The vegetation or hydrology of the described easement area will not be altered in any way or by any means or activity on the property conveyed by this deed, or property owned or under the control of the landowner, including (1) cutting or mowing; (2) cultivation; [(3) grazing;]² (4) harvesting wood products; (5) burning; (6) placing of refuse, wastes, chemicals, sewage, or other debris, (7) draining, dredging, channeling, filling, leveling, discing, pumping, diking, impounding and related activities, or [(8) diverting or affecting the natural flow of surface or underground waters into, within, and out of the easement area.]³

C. Notwithstanding the provisions of paragraph II-B above, the landowner shall be responsible for compliance with all federal, state and local laws for the control of noxious or other undesirable plants on the easement area. The responsibility for such plant control may be assumed in writing by and at the option of the Grantee where the control or manipulation of such plants is deemed by the Grantee to affect easement management programs or policies.

D. [Cattle or other stock shall not be permitted on the easement area, except that the Grantee shall permit access to and use of waters within the area necessary for stock watering under such terms and conditions as the Grantee deems necessary to protect and further the purposes of this easement, provided:

(1) the Grantee bears the costs of building and maintaining fencing or other facilities reasonably necessary to preclude stock from entering the easement area; and

¹ Use when access to the easement area is or may potentially be difficult based upon site conditions.

² Use only when paragraph III. F is used.

³ Use only for easement on wetland.

(2) access for stock watering need not be permitted where other waters are reasonably available from other sources outside the easement area.]]⁴

III. Rights Conveyed to Grantee

The Grantee and its successors or assigns, is conveyed the right, at its sole discretion, to manage the easement area including the following authorities:

- A. The right of reasonable ingress and egress on and across any and all lands and easements of the landowner ("servient estate") as of the date of this instrument, whether or not adjacent or appurtenant to the easement area, for access to the easement area in order to conduct wetlands management, monitoring, and easement enforcement activities. The Grantee may utilize vehicles and other reasonable modes of transportation for access purposes overland or on any right of way described in paragraph I. In the event that the use of the described access over the servient estate is not practical for any reason, the Grantee may utilize any convenient route of access to the easement area over the servient estate. With the concurrence of the Grantee, the landowner may provide a designated route for such access to and from the easement so that damage to farm operations can be reasonably avoided.
- B. The right to install, operate, and maintain structures for the purpose of reestablishing, protecting, and enhancing wetland functional values including the taking of construction materials to and from said sites.
- C. The right to establish or reestablish vegetation through seedings, plantings, or natural succession.
- D. The right to manipulate vegetation, topography and hydrology on the easement area through diking, pumping, water management, excavating, island construction, burning, cutting, pesticide application, fertilizing, and other appropriate practices.
- E. The right to conduct predator management activities.
- F. [The right to construct and maintain fences in order to prevent grazing or other types of encroachment on the easement area.]]⁵
- G. [Notwithstanding permissive provisions of State or Federal law, the right to prohibit or regulate hunting or fishing or other taking of migratory birds, fish and wildlife. This right to prohibit any of these activities shall be effected by (1) the Grantee posting the area, or (2) otherwise giving notice of the prohibitions to the landowner.]]⁶

⁴Use only when paragraph III.F is used.

⁵Use only when the Grantee intends to fence the easement area or a portion of the easement area.

⁶Use only when this is a necessary precondition for the Grantee to accept the easement.

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H. [The right to exclude landowner and/or public entry, if such entry is deemed to pose a threat to fish and wildlife or their habitat.]

IV. Easement Management and Administration. [Provision to be used where Forest Service, or State fish and game agency is Grantee.]

A. This easement shall be managed and administered by the Grantee.

B. The Grantee may enforce all the terms and conditions of this easement, along with all rights and powers conveyed in this easement through such general or specific regulations or orders as have been or may be, from time to time, promulgated under its general governmental authorities.

IV. Easement Management and Administration. [Provision to be used when the U.S. Fish and Wildlife Service is Grantee.]

A. All right, title and interests of the Grantee in this easement are administered by the United States Fish and Wildlife Service as part of the National Wildlife Refuge System pursuant to the National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd, et seq. The U.S. Fish and Wildlife Service may enforce all the terms and conditions of this easement, along with exercising all rights and powers conveyed in this easement through such general or specific regulations or orders as have been or may be, from time to time, promulgated under the authority of the Secretary of the Interior. Notwithstanding the above rights in paragraph III, conveyed to the Grantee, the U.S. Fish and Wildlife Service may permit the landowner to pursue such activities on said sites as would be consistent with the preservation and enhancement of floodplain and wetland functional values.

B. As used in this easement, the term "Grantee" shall refer to the authorized official of the U.S. Fish and Wildlife Service.

V. General Provisions.

A. The agreed upon purposes of this easement are the preservation and maintenance of the wetland and floodplain areas existing as of the date of this conveyance as well as protection and enhancement of plant and animal habitat and populations. Such purposes shall constitute the dominant estate within the easement area. A "wetland" is defined by reference to section 7(c) of Executive Order 11990 and a "floodplain" is defined by reference to section (6)c of Executive Order 11988. Any ambiguities in this easement shall be construed in a manner which best effectuates wetland preservation and fish and wildlife purposes.

B. Any subsequent amendment to or repeal of any federal law or order which authorizes this easement shall not affect the rights conveyed to the Grantee or subsequently held by its successors or assigns.

7 Use only when FWS recommends, with recommendation based upon severe, existing or potential threat to fish and wildlife.

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C. For purposes of this easement, wetland management rights conveyed to the Grantee include, but are not limited to, inspection for compliance with the terms of this easement; research regarding water, wetlands, fish and wildlife and associated ecology; and any other activity consistent with the preservation and enhancement of wetland functional values.

D. The Grantee, its successors and assigns shall have the right to make surveys, take photographs and prepare such other documentation as may be necessary or desirable to administer the provisions of this easement. Any such map, plat or other suitable document may be recorded in the land records of the respective county in which the property is located.

E. The easement does not authorize public entry upon or use of land. [Unless the Grantee prohibits public entry, the landowner may permit it at the landowner's discretion.]⁸

F. [Subject to paragraph III-G in this easement,]⁹ the landowner and invitees may hunt and fish on the easement area in accordance with all Federal, State and local game and fishery regulations.

G. This easement shall be binding on the landowner, and the landowner's heirs, successors or assigns. The landowner covenants to warrant and defend unto the Grantee, its successors or assigns, the quiet and peaceable use and enjoyment of the land and interests in the land constituting this easement against all claims and demands.

H. In the performance of any rights of the Grantee under this easement, the Grantee may permit, contract or otherwise provide for action by employees, agents, or assigns which may include the landowner.

[IV. State and/or local requirements.]

[Insert any State and/or local floodplain or wetland protection requirements that are more restrictive than those contained in the preceding paragraphs.]

⁸Use this sentence whenever paragraph III-H is used.

⁹Use this introductory phrase whenever paragraph III-G is used.

May 16, 1989

TO: Regional Attorneys
Attorneys-in-Charge

FROM: Richard L. Fowler Richard L. Fowler
Associate General Counsel
Community Development and Natural Resources

SUBJECT: Conveyances of Conservation Easements Under the Consolidated Farm and Rural Development Act

You may be aware that due to new requirements, the Farmers Home Administration (FmHA) is using conservation easements to protect important environmental resources located on both borrowers' farms and inventory farms. There are several authorities for establishing these easements and they include executive orders, specific environmental statutes and the Consolidated Farm and Rural Development Act (Con Act).

For borrowers' farms there is only one easement program. Section 349 of the Con Act allows FmHA's farm debtors to buy down their outstanding indebtedness to FmHA by encumbering either highly erodible land or environmentally sensitive areas of their farms with easements conveyed to the Federal Government. The easements are for a minimum of fifty years and are enforced by designated enforcement authorities. Eligible enforcement authorities are any Federal, State or local unit of government or a private or public nonprofit organization.

The terms of the easements are contained in Form FmHA 1951-39, "Grant of Easement", when the U.S. Fish and Wildlife Service (FWS) is the enforcement authority, and Form FmHA 1951-39A for all other enforcement authorities. A potential enforcement authority may also propose its own easement language as long as it does not conflict with FmHA's regulations contained in Exhibit H of Subpart S of Part 1951.

In some circumstances on FmHA's inventory farms, it may be required that conservation easements be created prior to sale, and in other circumstances this may be discretionary. Easements are required whenever any of the following resources are located on inventory farms: wetlands, floodplains, listed or proposed endangered or threatened species, listed or proposed critical habitats, designated or proposed wilderness areas, designated or proposed wild or scenic rivers, historic or archaeological sites listed or eligible for listing on the National Register of Historic Places, coastal

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barriers included in Coastal Barrier Resource System, natural landmarks listed on the National Registry of Natural Landmarks, and sole source aquifer recharge areas as designated by the Environmental Protection Agency. The FWS assists FmHA by surveying FmHA's farms and identifying the presence of these environmental resources.

On a discretionary basis FmHA can grant or sell conservation easements on its inventory farms to a unit of local, State, or Federal government, or a private nonprofit organization. These easements can be for almost any legitimate conservation purpose, but can only be considered either after the rights of all prior owners and operators have expired or prior to that if they consent to the easements.

There are some interesting nuances to the creation of easements on inventory property which are authorized by recent Con Act amendments which would seem to run counter to traditional common law rules regarding easements and fee title. One such traditional rule is that the holder of a fee title cannot split the estate without a conveyance to another party. Stated differently, easements merge into the fee when the same entity has title to both.

Under Con Act amendments, the United States can own fee title and yet the estate can be split among federal agencies with one agency holding an easement interest and another agency the residual fee. This exception to the customary rules of real property is found in the provisions of section 354 of the Con Act which states:

The Secretary [of Agriculture], without reimbursement, may transfer to any Federal or State agency, for conservation purposes any real property, or interest therein, administered by the Secretary under this Act --

(1) with respect to which the rights of all prior owners and operators have expired;

(2) that is determined by the Secretary to be suitable or surplus; and

that - (A) has marginal value for agricultural production; (B) is environmentally sensitive; or (C) has special management importance.

(7 U.S.C. 2002)

We have interpreted this provision as statutory authorization for the Secretary to convey a conservation easement to a federal or state agency. With respect to federal agencies, the easement can be conveyed to another agency by the Secretary leaving the fee title fully vested in the United States. We deem this language to authorize the Secretary to retain fee title to a tract on the FmHA inventory subject to a conservation easement for floodplain and wetland protection held by another federal agency such as the Fish & Wildlife Service of the Department of the Interior or the Forest Service in this Department.

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When the Secretary subsequently conveys fee title to a purchaser, the conveyance is subject to the easement held by the other federal agency.

In our opinion, there is ample authority for Congress to make such an exception to traditional state real property laws in order to effect a federal conservation purpose. See: United States v. Little Lake Misere Land Company, 412 U.S. 580 (1973); United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974). These cases hold that state property laws cannot be applied to preclude federal land acquisition programs which achieve an important federal purpose. As noted by the Court in U.S. v. Albrecht:

We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. 496 F.2d at 911.

Similarly, to the extent that implementation of the recent Con Act amendments might be inconsistent with traditional state laws regarding easements, we believe that federal law will prevail to the extent the state law would impede the federal program.

The Farmers Home Administration is completing instructions to its field offices concerning these new authorities regarding conservation easements. We wanted to alert you to our position with regard to the viability of easement conveyances within the federal sector from inventory lands.

If you have any questions regarding FmHA programs, please contact Mary Osowski in the Community Development Division at 447-5220. Questions regarding real property and easement conveyances can be referred to James B. Snow in the Natural Resources Division at 447-6055.

OGC:NRD/CDD:J.Snow/M.Osowski:5/5/89

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